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No. 90-1541

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY

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WASHINGTON STATE DEPARTMENT
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Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY

1. EPA has noted in its response that WSDOT should have filed its challenge to the Commencement Bay NPL listing in 1984 to "protect its interests," even though EPA had not yet decided whether the Tacoma Spur was part of the Commencement Bay site. Taking EPA's suggestion to its logical conclusion, every property owner within miles of a Superfund site would have to file comments or challenge the listing to similarly "protect their interests." Since state

agencies such as WSDOT own property throughout the state, this means that such an agency would have to file comments or challenge the listing of every Superfund site in the state.

Commenting or challenging an NPL listing is no small undertaking, since it usually requires the use of expert scientists or engineers to review EPA's data collection, analysis, and conclusions. Such resources are usually beyond the reach of the average property owner. It is outrageous for the federal government to suggest that individual property owners must go to such expense to "protect their interests" with respect to NPL listings, while EPA takes years to ponder whether to include certain property within the scope of an NPL designation. This "guilty until proved innocent" approach is completely without support. The burden should be on the agency to establish that its actions gave the affected parties adequate notice. Where the uncontested facts show that EPA has treated property as a "potential" NPL site for several years, EPA cannot show that its actions gave the owner adequate notice that the property would be considered part of a previously-listed site.

2. Apparently, it is significant to EPA's notice argument whether the Tacoma Spur property is in the "Tideflats," because EPA continues to misrepresent to the Court the actual location of the Tacoma Spur. EPA's published notice and supporting documents all refer to the "Tideflats" or the "Tideflats industrial area." The Tacoma Spur is not located in the Tideflats industrial area; it is located near downtown Tacoma. The fact that part of the highway is built on reclaimed tidelands is insignificant. Much of the urban shoreline of the entire Puget Sound region is built on reclaimed tidelands. The "Tideflats" and "reclaimed tidelands" are not interchangeable terms. Designation of the site as including the "Tideflats" could not have given adequate notice to WSDOT where WSDOT's property is not part of the Tideflats.

3. EPA cites to the 1990 version of the National Contingency Plan, 40 C.F.R. Part 300, as the controlling regula-

tions. The regulations that were in effect in 1984, however, are those that should be referred to in this case. These are the regulations that WSDOT was considered to have notice of and to be bound by at the time that contamination was discovered at the Tacoma Spur and at the time that EPA was conducting its investigations of the Tacoma Spur as a "potential" Superfund site. The regulations adopted in 1990, after this case was filed, no longer list the identification of "potential" Superfund sites as one of the goals of the preliminary assessment and site inspection such as those conducted by EPA at the Tacoma Spur in 1984 and 1988. The prior version of the regulations, however, note that one of "major purposes" of a site inspection is "[t]o collect data, where appropriate, to determine whether a site where a release has occurred or may occur should be included on the NPL." 40 C.F.R. Part 300.66(4)(iii) (1987). This was the law at the time that EPA conducted its activities at the Tacoma Spur. This is what WSDOT was entitled to relay on as one of the purposes of EPA's preliminary assessment and site inspection.

4. The legal issue presented here is what notice is adequate when a party has been drawn into a Superfund site long after the time for commenting or challenging the NPL listing has expired. EPA has attempted to trivialize this problem by focusing on the "limited purpose" of the NPL. Every individual or entity that owns property within several miles of a Superfund site is at risk of being subjected to the same treatment that WSDOT has received from EPA. The agency can simply refuse to make a decision as to an NPL designation's effect on that owner until the owner's statutory right to comment and to obtain judicial review has expired. The Court should take this opportunity to define the notice to which these property owners are entitled.

CONCLUSION

For the foregoing reasons, WSDOT respectfully requests that the Court grant its petition for certiorari.

Respectfully submitted this 7th day of June, 1991.

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